U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, D.C. 20001-8002

Date: March 6, 1998

Case No: 96-INA-403

In the Matter of:

VIKISHA CORPORATION,
Employer,

On Behalf of:

RAKESH PATEL,
Alien.

Appearance: Mr. Charles R. Tribbitt, Esq.
for Alien and Employer

Before: Burke, Vittone and Wood
Administrative Law Judges

DECISION AND ORDER

Per Curiam: The case entitled above arose from an application for labor certification filed on behalf of Rakesh Patel ("Alien") by Vikisha Corporation ("Employer") pursuant to section 212 (a)(5)(A) of the Immigration and Nationality Act, as amended, Title Eight, United States Code, Section 1182(a)(5)(A)(the "Act") and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer (CO) of the United States Department of Labor denied the application and the employer requested review of that decision pursuant to 20 C.F.R. §656.26.

The following decision is based on the record upon which the CO denied certification and Employer's request for review, as contained in the Appeal File ("AF"), and any written argument of the parties. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

Employer applied for alien employment certification on behalf of Alien Rakesh Patel on February 27, 1995 (AF 1-12). The job opportunity stated on ETA form 750A was for a stock supervisor for a wholesaler of candies, tobacco and food (AF 12, 67). The job duties indicate the job includes "ordering, receiving, storing and inventorying, candy tobacco and food products, including Indian ethnic food items[.]" Employer required a 10th grade education and two years experience in the job offered or equivalent years as a stock or inventory clerk working with the same products. Employer listed no further requirements. The New Jersey Division of

Employment Services referred nine U.S. applications to Employer (AF 17-46). Employer rejected all applicants due to lack of knowledge with food and tobacco products and Indian ethnic food (AF 94-95).

The CO issued a Notice of Findings ("NOF") dated March 20, 1996 (AF 53-56). The CO questioned the nature of the Employer's reasons for rejecting all other U.S. applicants. The CO referenced 20 C.F.R. §656.21(b)(2) which requires that an employer document that the requirements for the position, unless arising from business necessity, are those normally required for the performance of the job in the United States. The CO found that Employer's additional requirement that a stock or inventory clerk's experience must include candy, tobacco, and food products is restrictive and may have been added to tailor the job requirements to the alien. Employer was given the opportunity to rebut this finding of the CO by either:

1. Deleting the "same products" portion of the related experience requirement, or

2. Documenting how the additional requirement arises from business necessity. (20 CFR §656.21(b)(2)(i) explains how to establish business necessity.)

In addition, the CO cited 20 C.F.R. §656.24(b)(2)(ii), which states, in part, that a CO shall consider a U.S. worker able, and qualified for the job opportunity, if by education, training, experience, or a combination thereof, the worker is able to perform in a normally accepted manner the duties involved in the occupation as customarily performed by other U.S. workers similarly employed. CO also cited §656.21(b)(6) and §656.20(c)(8) and stated that based on applicants' resumes, employer's recruitment report, and routine post recruitment follow-up letters, that the rejections of four out of the nine applicants were still at issue. The four applicants were:

Mark Patton
Cicil Stepney
Raymond Lullwitz
Josue E. Alcantara

The CO requested that Employer respond to the discrepancies noted and provide documentation showing that these applicants were not qualified, willing, or available at the time of initial consideration or referral.

Employer's rebuttal dated April 2, 1996 (AF 57-59) stated that a requirement for stock supervisor is "experience in handling the products in which we deal." In addition, Employer stated that knowledge of candies is required "to judge whether the goods we get, really conform to what we want." Employer also stated that the same considerations apply to Indian spices and ethnic food products, as well as tobacco. Employer also apologized for failing to reach Mr. Lullwitz, stating that "we must have misdialed or made some other mistake." Employer failed to state the status of the other three workers noted above.

On April 25, 1996, the CO issued a Final Determination (AF 60-62) denying certification on the basis that Employer failed to document and prove business necessity, 20 C.F.R. §656.21

(b)(2). In addition, the CO also questioned Employer's rejection of four U.S. applicants who, absent Employer's restrictive requirement, would have qualified for the job duties. Upon the issuance of the Final Determination the employer appealed to the Board.

DISCUSSION

It is well settled that Employer, seeking the benefit of a special provision of the Immigration and Nationality Act under which a foreign worker is to be certified to take a job within the United States for which U.S. workers have applied, has the burden of proof on an appeal from a Certifying Officer's denial of certification. *Cathay Carpet Mill, Inc.*, 87-INA-161 (Dec. 7, 1988) (*en banc*). In our judgment, Employer has failed to discharge that burden here.

The regulatory language of 20 C.F.R. §656.21(b)(6) addresses the situation of an employer showing that he has rejected U.S. applicants solely for lawful job-related reasons. In addition, the job opportunity must have been open to any qualified U.S. worker. 20 C.F.R. §656.20 (c)(8). Therefore, an employer must take steps to ensure that it has obtained lawful job-related reasons for rejecting U.S. applicants, and not stop short of fully investigating an applicant's qualifications. Actions by an employer which indicate a lack of good faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are thus a basis for denying certification. In such circumstances, an employer must prove that there are not sufficient U.S. workers who are "able, willing, qualified, and available" to perform the work. 20 C.F.R. §656.1.

Assuming that Employer's job requirements are not unduly restrictive, Employer's rebuttal (AF 57-59) failed to document that U.S. applicant Josue E. Alcantara was not "able, qualified, willing, or available" at the time of initial consideration and referral. Applicant Alcantara indicated that he had a high school education, over 2 years of experience as a "supervisor - stock move department," and (in a handwritten notation) 3 years of experience working in a supermarket (AF 33). Yet, in Employer's report on results of recruitment, Employer stated that applicant Alcantara had no experience with tobacco and cigarette products or with Indian ethnic food (AF 44).

The Certifying Officer shall consider a U.S. worker able and qualified for the job opportunity if the worker, by education, training, experience, or a combination thereof, is able to perform in the normally accepted manner the duties involved in the occupation as customarily performed by other U.S. workers similarly employed. We agree with the CO that applicant Alcantara, with his 3 years experience as a stock supervisor for a paper company and 3 years of experience working in a supermarket, could reasonably perform the duties of this job, and Employer's rejection of this applicant was unlawful.

Further, Employer's failure to justify its untimely contact of Mr. Raymond Lullwitz was not documented in its rebuttal. Failure to timely contact the U.S. applicants indicates a failure to recruit in good faith. ***Loma Linda Foods, Inc.*** 89-INA-289 (Nov. 26, 1991) (*en banc*). In addition, Employer must provide an objective, detailed basis for its conclusion that the applicant was not qualified. ***See Impell Corp.***, 88-INA-298 (May 31, 1989); ***Japan Budget travel Int'l***,

90-INA-277 (Oct. 7, 1991). ***Rafa's Roofing***, 95-INA 287 (Dec. 19, 1996). Actions by the employer which indicate a lack of good faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are thus a basis for denying certification.

Because we find the Employer failed to reject U.S. applicants solely for lawful related reasons, 20 C.F.R. §656.21(b)(6), it is unnecessary to address other issues.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED.**

SO ORDERED.

Entered at the direction of the panel by:

Todd R. Smyth
Secretary of the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.